SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970-1971

No. 1095

BORDEN, INC.,

Petitioner,

vs.

ICE CREAM DRIVERS & EMPLOYEES UNION LOCAL 757, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABELOW
767 Fifth Avenue
New York, New York 10022
(212) 738-7800
Counsel for Petitioner,
Borden, Inc.

CARL A. SCHWARZ JR.
WEIL, GOTSHAL & MANGES
of Counsel

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In the

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No. .....

Borden, Inc.,

Petitioner,

vs.

Ice Cream Drivers & Employers Union Local 757, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, in an action entitled *Ice Cream Drivers & Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Plaintiff-Appellant-Appellee, against Borden, Inc., Defendant-Appellee-Appellant.*

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 312 F.Supp. 549 (S.D.N.Y. 1970) and is printed in Appendix A hereto.

infra, p. 13. The judgment of the United States District Court for the Southern District of New York is printed in Appendix B hereto, *infra*, p. 22.

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court is reported at —— F.2d ——, 75 LRRM 2681 (1970), and is printed in Appendix C hereto, *infra*, p. 26.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was filed on October 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

I.

Is the judgment of the United States District Court for the Southern District of New York, as affirmed by the United States Court of Appeals for the Second Circuit, in conflict with the decision of this Court in the case of *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), to the extent that it grants relief to a Union, which is acting in violation of its no strike pledge in a Collective Bargaining Agreement, by requiring the employer being struck to arbitrate over the very issues over which the Union is striking?

II.

Under the facts and circumstances of this case, did the conduct of the Union in refusing Petitioner's request for arbitration and its subsequent strike constitute a fundamental and long lasting change in the relationship of the parties prior to the Union's demand for arbitration which would release the parties to the Collective Bargaining Agreement from their obligation to arbitrate under this Court's decision in *Local Union 721, United Packinghouse Food & Allied Workers* v. *Needham Packing Co.*, 376 U.S. 271 (1964), and *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionary Workers International*, 370 U.S. 254 (1962)?

III.

Does this Court's decision in *Local Union 721, United Packinghouse Food & Allied Workers* v. *Needham Packing Co.*, 376 U.S. 271 (1964) and *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionary Workers International*, 370 U.S. 254 (1962) require that a Union which is a party to a Collective Bargaining Agreement containing an all inclusive arbitration clause "actually repudiate" said arbitration clause as required by the decision of the United States Circuit Court for the Eighth Circuit in *Minnesota Joint Board, Amalgamated Clothing Workers of America* v. *United Garment Manufacturing Co.*, 338 F.2d 195 (1964) and relied on by the District Court in its decision herein. If so, did the facts and circumstances of this case constitute an "actual repudiation"?

IV.

Does this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) compel a reconsideration by this Court of its decisions in *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionary Workers International*, 370 U.S. 254 (1962) and *Local Union 721, United Packinghouse Food & Allied Workers* v. *Needham Packing Co.*, 376 U.S. 271 (1964) which were relied on by both the District Court and Court of Appeals below?

V.

Did the United States District Court for the Southern District of New York in its Judgment, as affirmed by the United States Court of Appeals for the Second Circuit, err in granting Summary Judgment for the Respondent and ordering arbitration in the light of the existence of controverted issues of material facts which it referred to arbitration?

Statute Involved

The statutory provision involved is Section 301(a) of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U.S.C., Section 185(a).

Statement of the Case

This petition seeks a review of the judgment of the United States Court of Appeals for the Second Circuit affirming an order of the United States District Court for the Southern District of New York ordering an arbitration

between Petitioner (Borden, Inc., hereinafter "Borden") and Respondent (Ice Cream Drivers & Employees Union Local 757, etc., hereinafter "the Union").

Borden and the Union entered into a Collective Bargaining Agreement (hereinafter the Contract) effective May 1, 1968 and terminating on April 30, 1971, covering all of the employees of Borden engaged in the production and distribution of ice cream in what the Contract terms the "757 area". That area is constituted by New York City, Nassau and Suffolk Counties in the State of New York. The Contract contains an all inclusive arbitration clause and a broad no-strike clause.

On August 25, 1969, representatives of Borden and the Union met at Borden's request to discuss the possible closing of Borden's only ice cream production facility in the 757 area. At Borden's request, almost continual negotiations took place in regard to the proposed closing and the problems incidental thereto. The Union's initial response was that the projected closing would, in the Union's opinion, violate the Contract between the parties and would subject Borden to an immediate liability of seven million dollars ($7,000,000.00). The Union also asserted that the Contract prohibited Borden from discontinuing its manufacturing operations in the 757 area. Borden, on the other hand, maintained that the Contract did not prohibit it from going entirely out of business in the 757 area.

The Contract in question contained clauses permitting layoffs, severance pay and required specified payments to permanently laid-off employees who lost their jobs for lack of work or other economic causes. Borden asserted that it was required to maintain its manufacturing facilities

in the 757 area only so long as it continued to do business in the area by distributing products within it.

Despite the Union's threats of economic reprisal, the parties met and continued to meet at Borden's behest. On October 1, 1969 Borden proposed an immediate arbitration of the disputed issues and offered to keep the facility open and operating during the pendency of the arbitration and abide by the decision of the arbitrator. To this, the Union answered that it could give no assurances it would abide by a decision of the arbitrator adverse to it, and that in no event could it foresee an expeditious arbitration which could resolve the dispute. Borden reluctantly closed its only ice cream production facility in the 757 area at approximately 3:00 P.M. on October 3, 1969. At that time, over 100 employees were requested to report for work at the plant and at various other Borden facilities throughout the 757 area. Some of these employees had the right to exercise "bumping" rights into other jobs because of their seniority. Others were in classifications not immediately affected by the elimination of manufacturing.

In spite of a broad and all inclusive clause in the Contract which provided "no strikes, lockouts, walkouts or slowdowns shall be ordered, sanctioned or enforced by either party hereto against the other for the life of this Agreement", the Union struck Borden at 3:00 P.M. on October 3, 1969 and pickets appeared at the closed facility and at other Borden facilities in Nassau County. On October 6, 1969, the Monday following the closing, the Union struck *all* Borden ice cream production and distribution facilities throughout the 757 area, as well as Borden facilities in Northern New Jersey where Local 680 of the Teamsters had a contract.

Borden again offered to arbitrate immediately provided that the strike and picketing stopped. The Union refused to call off the strike and stop picketing.

The strike and the picketing were continuing in November of 1969, when the Union filed its complaint in the District Court and were continuing in January of 1970 when the Union moved for Summary Judgment. The strike and picketing were continuing on April 21, 1970 when Judge Cooper rendered his decision. The strike continued while the case was being argued in the Second Circuit although the picketing ceased prior to argument. During all this time the Union contended there was no strike, but that they were locked out.

The complaint filed by the Union alleged that Borden had closed its plant in violation of the Contract, stated that the dispute was arbitrable, that the Union had demanded arbitration and that Borden had refused to arbitrate.

Borden answered explicitly denying all of the Union's allegations, admitting only that it had closed its plant on or about October 3, 1969. Borden counterclaimed that the Union had waived its right to arbitration or, in the alternative, that the Union could not compel arbitration while an illegal strike was in progress.

On December 29, 1969, the Union moved for Summary Judgment. In support of its motion, the Union asserted in its Rule 9(g) Statement that it had demanded and Borden had refused to proceed to arbitration. Borden answered that there were questions of fact precluding Summary Judgment and further put in issue whether the strike and evasive conduct of the Union justified Borden's refusal to proceed to arbitration while the strike continued.

The District Court rejected Borden's arguments and directed that arbitration proceed on the issues as framed by the Court. In doing so, the District Court relied on *Local Union No. 721 United Packinghouse, Food & Allied Workers* v. *Needham Packing Co.*, 376 U.S. 271 (1964) and on *Minnesota Joint Board, Amalgamated Clothing Workers of America* v. *United Garment Manufacturing Co.*, 388 F. 2d 195 (8th Cir. 1964) as controlling.

Both Borden and the Union appealed from the judgment of the District Court. Borden appealed from the dismissal of the counterclaim and the order to proceed to arbitration. The Union cross-appealed from that portion of the judgment which defined the issue to be arbitrated.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. It held that arbitration rights were not necessarily forfeited by the breach of the no-strike clause and rejected Borden's contention that the existence of genuine issues of material facts made the Summary Judgment inappropriate. The Court affirmed that portion of the District Court's judgment which defined the issues to be arbitrated. In affirming the District Court's judgment, the Circuit Court relied upon the decisions of the Supreme Court in *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers International, supra* and *Local 721 United Packinghouse, Food & Allied Workers* v. *Needham Packing Co., supra.* The Court rejected Borden's argument that the case of *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770, supra* required a re-evaluation of *Drake Bakeries* and *Needham* and concluded that "unless there is to be found any statement in *Boys Markets* to the contrary, the law as expounded in *Drake Bakeries* and in

Needham is that breach of a no-strike clause in a labor agreement does not *ipso facto* relieve an employer of his obligation to arbitrate the disputes engendered by the acts causative of the strike." The Court concluded that *Boys Markets* did not change the law as expounded in *Drake Bakeries* or *Needham*.

Reasons for Granting the Writ of Certiorari

Borden urges that this Court reconsider its holdings in *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers International*, 370 U.S. 254 (1962) and *Local 721 United Packinghouse, Food & Allied Workers* v. *Needham Packing Co.*, 376 U.S. 271 (1964) in light of this Court's recent holding in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

It is apparent that the decisions of both the District Court and the Second Circuit are grounded in the philosophy that a union can strike in violation of a no-strike clause over an arbitrable issue and simultaneously invoke the power of the courts in compelling arbitration. Such a judicial axiom renders the *quid pro quo* equation stated in *Textile Workers of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957) meaningless and has an effect contrary to the recent decision of this Court in *Boys Markets*, which restored the impact of the *quid pro quo* enunciated in *Lincoln Mills*.

Prior to the decision in *Boys Markets* an arbitration clause would be enforced while a strike could not be enjoined. Subsequent to that decision, the incapacity imposed upon the courts by Section 4 of the Norris-LaGuardia Act,

29 U.S.C. §104, was removed. Now, in the instant case the Court of Appeals for the Second Circuit, with *Boys Markets* clearly before it, harkens back to the philosophy of *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962) and justifies its decision with *Drake* and *Needham*. It is Borden's contention that both *Drake* and *Needham* are no longer in harmony with the current state of the law and should be re-evaluated. Borden contends that the decision in *Boys Markets* requires such a re-evaluation.

Borden contends that the Union by refusing Borden's request to arbitrate before the plant was closed and its subsequent strike created a fundamental and long lasting change in the relationship of the parties prior to the Union's demand for arbitration. This Court stated in *Needham* that a fundamental and long lasting change in the relationship of the parties would release an employer from his promise to arbitrate (376 U.S. at 253). *Drake* contains very similar language (370 U.S. at 265-266). The District Court relied heavily on the decision of the Eighth Circuit in *Minnesota Joint Board* which interpreted the language in *Needham* to require an "actual repudiation" of the Contract to effect such a release. (338 F.2d at 199 n. 1). The Second Circuit, in affirming the District Court, completely ignored the decision in *Minnesota Joint Board*.

Therefore, there exists an important and undecided question, except in the Eighth Circuit, as to what is required to constitute a *fundamental and long-lasting change in the relationship of the parties which would release one party from his duty to arbitrate*. A question of this importance is properly one for this Court to resolve. Such resolution would more certainly define the parameters of legitimate action which the parties could take in a labor dispute. The

more precisely these limitations are defined, the more industrial tranquillity can be achieved.

Borden further contends that the existence of genuine issues of material facts presented by the pleadings and the affidavits submitted to the District Court precluded Summary Judgment and required a hearing.

Borden contended that the Union was on strike, the Union contended it was locked out. The District Court concluded this issue alone compelled arbitration and the Court of Appeals agreed. It is Borden's position that the injunctive relief accorded by the decision in *Boys Markets* would be wholly vitiated if every time a union went out on strike it could raise the familiar cry of "lockout" which would automatically require an arbitration on this issue to determine if the criteria of *Boys Markets* were met enabling the courts to issue an injunction.

Borden also contends three other issues of fact involving the Union's tactics in attempting to utilize its strike power and at the same time compel arbitration bar Summary Judgment.

The instant litigation is significant in that it offers the opportunity to harmonize the decisions in *Drake* and *Needham* with the decision in *Boys Markets*. The decision of the Second Circuit is the first to reconcile the earlier decisions with *Boys Markets*. In holding that the Union did not waive its right to arbitration by initially refusing to arbitrate prior to the plant closing, and then striking in violation of the Contract, the Second Circuit has given the decision in *Boys Markets* a very limited application and has left intact the principles established in *Drake* and *Needham*. The extent to which *Boys Markets* will or ought

to be applied is of vast significance to the labor bar. This cause provides an early opportunity for such a clarification.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Anslow
Counsel for Petitioner,
Borden, Inc.
Office and P.O. Address
767 Fifth Avenue
New York, N. Y. 10022
Telephone (212) 758-7800

Carl A. Schwarz Jr.
Weil, Gotshal & Manges
of Counsel

APPENDICES

APPENDIX A

Opinion of Irving Ben Cooper, District Judge, Filed April 21, 1970

This is an action by plaintiff Ice Cream Drivers and Employees Union Local 757 (hereinafter "Union") to compel defendant Borden, Inc. (hereinafter "Borden") to arbitrate the issues of whether or not Borden's closing on October 3, 1969 of its Fifth Avenue Plant, and thereafter its alleged importation into the Metropolitan Area of ice cream manufactured outside of the Metropolitan Area, violated sections 2(e)[1] and 2(d)[2] respectively of the col-

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[1] §2(e) provides in part:

"The Company agrees for the term of this Agreement not to remove its manufacturing operations from the area of Local 757 and to continue to manufacture within the area of Local 757, and the Company, including any affiliates or subsidiaries, agrees that it shall not establish or operate a plant for production of ice cream or frozen dessert products outside of the Local 757 area for sale or distribution of such products in the Metropolitan area. . . .

[2] ¶2(d) provides in part:

"The Company agrees not to contract out work customarily performed by its employees. . . .

. . . (T)he Company will not purchase or obtain products from any source including any other division or plant of the Company except from an employer in the Metropolitan Area as defined in this Agreement providing its employees with wages, hours and benefits and all other terms and conditions of employment equal to or better than the requirements of this Agreement. It is further agreed that the Company will not purchase or obtain products from any source whatever including any other division or plant of the Company if any permanent production employee who is actively employed on May 1, 1968 or thereafter is on lay-off from the production department and has been on lay-off for a period of one (1) year or less at the time of the purchase of the product.

• • • • •

In the event of a substantial loss of business making it impossible for a company to comply with the limitations of sec-

lectively-bargained Ice Cream Industry Area-Wide Agreement (hereinafter "Agreement") entered into by the parties on May 1, 1968 effective until April 30, 1971.

Plaintiff moves for summary judgment granting the relief requested pursuant to Rule 56, F.R.Civ.P. and for dismissal of defendant's counterclaim which seeks a declaratory judgment based on the premise that by reason of the Union's alleged illegal strike it has forfeited and waived its right to arbitration, or at least has no such right while the strike continues. Defendant resists these motions contending genuine issues of material facts are present.

The relevant facts viewed in the light most favorable to defendant follow. On August 25, 1969 representatives of the Union and Borden met to discuss the proposed closing of Borden's only manufacturing facility in the Local 757 Area, the Fifth Avenue Plant. As a consequence of the above-mentioned contractual restrictions, sections 2(d) and 2(e), Borden, in addition to terminating production, decided it must discontinue distribution in the 757 Area as well. The Union orally and by telegram dated September 2, 1969 notified Borden of its position that such proposed action would be violative of the contractual commitment" . . . to continue to manufacture within the area of Local 757."

Borden notified its employees covered by this 757 Area agreement that the last day of production would be on Friday, October 3, 1969, and that the remaining inventory would be distributed until dissipated at which point Borden would

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tion 2(d) with respect to the purchase of products while permanent production employees are on lay-off, the Union and the Company shall meet to discuss the matter and attempt to arrive at an adjustment by mutual agreement, but in the event of disagreement such matters shall not be subject to arbitration hereunder, except with the agreement of the Union."

go out of the ice cream business in their area. On October 1, 1969 Borden by telegram to the Union demanded immediate arbitration of "the company's right to go out of business" stating that "it is necessary that this issue be finally resolved prior to our plant closing on October 3" and promising cooperation "to expedite the arbitration to resolve this issue within the time limits." The Union responded by telegram that day suggesting they meet to discuss issues which may be appropriate for arbitration and procedures therefor.

Such meetings between the parties were held on October 1, 2 and 3. Borden contends that at such negotiations the Union while professing willingness to arbitrate would not agree to expedited arbitration. On October 3, Borden closed the Fifth Avenue Plant. Immediately thereafter that same day the Union began picketing this plant and other Borden facilities. On October 6, the Union allegedly struck all Borden facilities throughout the 757 area and northern New Jersey; the strike and picketing still continue.

On October 13, 1969 the Union by letter to Borden requested arbitration as to whether the Company violated §2(e) of the Contract by closing its plant. Borden replied by letter dated October 17 that it would proceed toward arbitration "as soon as the illegal work stoppage of 757, IBT ceases and the pickets are removed from our premises." On October 24, 1969 the Union wrote the Chairman of the New York State Mediations Board requesting arbitration as to whether the Company violated sections 2(d) and (e) of the Contract. Responding to this request, Borden wrote the Board on November 4, 1969 reiterating its position that no arbitration proceeding should be processed until the strike and picketing ceased, and that without preju-

dice to its position in that regard it was selecting three names from the list of arbitrators. The Mediation Board, in accordance with its procedures and after receiving the selections of both parties, designated Mr. Burton Turkus as Arbitrator. Borden refused to proceed. On November 13, 1969 this action was commenced by the Union.

The Agreement contains a broad, all inclusive arbitration clause:

> "8. Any and all disputes and controversies arising under or in connection with the terms or provisions of this Agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect of anything not herein expressly provided but germane to the subject matter of this Agreement which the representative of the Union and the Company have been unable to adjust, shall be submitted to arbitration, at the request of either party. . . . "
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> • • • • •
>
> The arbitration procedures herein contained shall be the exclusive remedy for the enforcement of this Agreement and for adjudication of any grievances arising hereunder, and such arbitration procedures may be instituted only by the Union or Employer."

The parties concede that the underlying dispute over whether Borden violated sections 2(d) and (e) is encompassed within their agreement to arbitrate and thus arbitrable. Cf. *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

Defendant seeks to avoid arbitration on the ground that plaintiff has waived its right thereto in that the Union has violated section 5(a) of the Agreement.

> "No strikes, lockouts, walkouts or slowdowns shall be ordered, sanctioned or enforced by either party hereto against the other during the life of this Agreement."

Thus, the Union's alleged violation of the no-strike clause, combined with its earlier failure to accept Borden's proposal for expedited arbitration, is said to waive the Union's right to invoke the procedure agreed upon by the parties as the exclusive remedy for resolving any and all of their disputes. We disagree.

First, we believe Borden's contention that the union is on strike in violation of the no-strike clause,[3] an initial premise of its waiver argument, must itself be resolved by an arbitrator and not by this Court. See *G. F. Wright Steel & Wire Co.* v. *United Steelworkers*, 346 F.2d 928 (1st Cir. 1965). See also, *Drake Bakeries Inc.* v. *Local 50, American Bakery & Confectionery Workers Internat'l*, 370 U.S. 254, 266 (1962). This alone compels requiring arbitration here.

Second, we find the decision of the Supreme Court in *Local Union No. 721, United Packinghouse Food & Allied Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964) controlling here. In *Needham* defendant therein argued, as Borden does here, that breach of the no-strike clause by the union constituted a waiver of its right to arbitrate. *United Packinghouse Workers* v. *Needham*, 376 U.S. at 249, reversing 254 Iowa at 887, 119 N.W. 2d at 143.

Following discharge of an employee by Needham on May 11, 1961, 190 other employees and members of the Packinghouse Union left work that same day. Needham advised the employees to return to work stating that the

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[3] The Union contends that there is no strike and that the plant closing constituted a lock-out.

discharge "would be treated under the grievance procedures of the collective bargaining agreement" and "that if they did not their employment would be regarded as terminated." 376 U.S. at 248. They did not return. On July 5, 1961 (almost two months after the walk-out began) the union finally presented written grievances on behalf of the employee first discharged and the 190 later discharged. Needham refused to process the grievances.

The union sued to compel arbitration; the company asserted breach of the no strike clause by way of defense and counterclaim. A judgment on the pleadings in favor of Needham affirmed by the Iowa Supreme Court was reversed by the United States Supreme Court which held that Needham was governed by *Drake Bakeries* and that breach of the no-strike clause did not relieve the employer of its duty to arbitrate.

The Packinghouse Union was not held to have waived arbitration even though immediately following the walkout Needham offered to process the dispute by the grievance procedure if the employees returned and despite the fact that the employees did not return and the union did not file a grievance until almost two months later. A mere showing that "[one] party had engaged in action which could be contended to be in disregard of the obligation on its part to arbitrate" would not release the other party from its obligation to have the controversy finally determined by arbitration. *Minnesota Joint Bd., Amal. Clothing Workers* v. *United Garment Mfg. Co.*, 338 F.2d 195, 199 (8th Cir. 1964).

"Such action would have to represent more than a mere ignoring of the obligation to arbitrate. It would have to constitute a repudiation of the obligation itself." *Id.* The Court in *Minnesota Joint Board* rejected any contention

that the concepts of waiver or estoppel were applicable, and concluded that on the present state of the law following *Drake Bakeries* and *Needham* any excuse from the duty to arbitrate depended upon a showing of actual repudiation. *Id.* at 199 n.1.

Borden concedes that the Union at no time expressly refused to arbitrate the issue of the plant closing. Here as in *Needham* and *Drake Bakeries* the bargaining agreement in no way expressly conditions the availability of arbitration upon no strike over the grievance. See *International Union of Elec., Radio & Machine Workers* v. *General Electric Co.*, 332 F.2d 485, 492 (2d Cir. 1964); *Trailways of New England Inc.* v. *Amalgamated Assoc. etc.*, 343 F.2d 815, 817 (1st Cir. 1965). From the affidavits and exhibits submitted by both sides herein we believe it evident, and Borden does not contend to the contrary, that there was no actual repudiation by the union of the agreement to arbitrate.

Commentators have suggested that the Supreme Court may distinguish "a situation where the union breach is clear and substantial and the employer has given notice of termination of the entire labor agreement, and has acted consistently with such notice." Smith & Jones, "The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties," 52 U. Va. L. Rev. 831, 845-46 (1966). None of these factors are satisfied here.

Borden seeks to distinguish *Needham* on the ground the Supreme Court left open "whether a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate." 376 U.S. at 253. We assume argu-

endo that such a change might effect a release. But cf. *Minnesota Joint Board* v. *United Garment Co.*, *supra* at 199 n.1.

In this regard, it asserts first that such change is present here because the Union is still out on strike. In *Needham*, however, the Iowa Supreme Court in the course of upholding the lower court's refusal to compel arbitration stated:

> "It is not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto." 119 N.W. 2d at 141.

Thus, this same factor was present in *Needham*. Further, to the extent Borden argues that arbitration should be stayed pending termination of the work stoppage, it would appear that the effect to be given an alleged illegal strike which is still continuing is a matter for the arbitrator to determine. Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 555-59 (1964).

Borden also asserts that its closing of the plant is "a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration" releasing it from its duty to arbitrate. This contention likewise fails for the reason that (1) the closing occurred prior to and in fact precipitated the alleged breach of the no-strike clause and is the very dispute sought to be arbitrated here, and (2) only ten days elapsed between the plant closing and the union's request for arbitration.[4]

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[4] Lack of timeliness in requesting arbitration, if defendant asserts such by way of defense before us, is a matter not for the court but for the arbitrator to determine. See *John Wiley & Sons, Inc.* v. *Livingston*, *supra*.

We note also that it may be that the effect to be given the closing of the plant, like questions of timeliness in requesting arbitration, are matters to be decided by the arbitrator. See *Local Lodge No.*

Finally, at least one Circuit has expressly held that the Supreme Court decisions in this area must not be given a restrictive reading of the sort pressed by defendant Borden. See *Minnesota Joint Board* v. *United Garment Mfg. Co.*, 338 F.2d 195, 200 (8th Cir. 1964). See also, 52 U.Va.L. Rev. at 844; Katz, "Arbitration Favored Child of Preemption," 17 N.Y.U. Conf. L. 27, 42-43 (1964).

Accordingly, for the reasons set forth above, plaintiff's motions for summary judgment in its favor compelling arbitration and for dismissal of defendant's counterclaim are granted.

Settle order on notice.

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595 of Dist. No. 152. Internat'l Ass'n of Machinists v. *Howe Sound Co.*, 350 U.S. 508, 511 (3d Cir. 1965); *Minnesota Joint Board* v. *United Garment Co., supra* at 200. We believe this would be so only where the closing was urged as affecting procedural issues and not the validity or applicability of an alleged obligation to arbitrate. See generally, *John Wiley & Sons, Inc.* v. *Livingston, supra.*

APPENDIX B

Judgment of the United States District Court, Filed May 15, 1970

Plaintiff by its attorneys, Cohen and Weiss, having moved this Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and said motion having come on to be heard before the Honorable Irving Ben Cooper, United States District Judge, on the 3rd day of February, 1970,

Now, upon reading and filing the summons, dated November 13, 1969, the complaint dated November 13, 1969, the reply, dated December 15, 1969, the notice of motion dated December 29, 1969, the affidavits of Samuel J. Cohen, sworn to the 29th day of December, 1969, and the 3rd day of February, 1970, and the exhibits annexed thereto, and Plaintiff's statement pursuant to Rule 9(g) of the General Rules of this Court, dated December 29, 1969, all submitted in support of Plaintiff's motion for summary judgment, the answer and counterclaim, dated November 25, 1969, the affidavit of Stanley J. Broekman, sworn to the 30 day of January, 1970, and the exhibits annexed thereto, and Defendant's answer to Plaintiff's statement pursuant to Rule 9(g) of the General Rules of this Court dated January 30, 1970, all submitted in opposition to Plaintiff's motion for summary judgment, and having heard Samuel J. Cohen, of counsel for Cohen and Weiss, attorneys for Plaintiff, and Carl A. Schwarz, Jr., of counsel for Weil, Gotshal & Manges, attorneys for Defendant, and having read and filed the memoranda of law submitted by the attorneys for Plaintiff and by the attorneys for defendant; and due delibera-

tion having been had thereon; and having read and filed the opinion of this Court, dated April 21, 1970; it is upon motion of Cohen and Weiss, attorneys for Plaintiff,

ORDERED, ADJUDGED AND DECREED that:

1. The Plaintiff's motion for summary judgment is in all respects granted;

2. The Defendant's counterclaim is dismissed; and

3. The Defendant, Borden, Inc., shall submit to arbitration before Arbitrator Burton Turkus the disputes between Borden, Inc. and Ice Cream Drivers and Employees Union Local 757 arising out of Borden, Inc.'s closing of its manufacturing operations in the area, defined by the Collective Bargaining Agreement as the 757 Area.

Provided that "3." of this Order be and is hereby suspended pending appeal of this Order to the U.S. Court of Appeals for the Second Circuit for a period not to exceed ninety days from the date hereof.

Dated: New York, New York
May 15, 1970.

IRVING BEN COOPER
United States District Judge

Judgment Entered—5/15/70

JOHN LIVINGSTON
Clerk

APPENDIX C

Opinion of the United States Court of Appeals For the Second Circuit

Filed October 26, 1970

Before:

WATERMAN, MOORE and KAUFMAN,
Circuit Judges.

Appeal from a judgment entered May 15, 1970, in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, granting plaintiff's motion for summary judgment, dismissing defendant's counterclaim and ordering defendant to proceed to arbitration of "the disputes between Borden, Inc. and Ice Cream Drivers and Employees Union, Local 757 arising out of Borden, Inc.'s closing of its manufacturing operations in the area. . . ." Defendant appeals from the dismissal of the counterclaim and the order to proceed to arbitration. Plaintiff cross appeals from that portion of the judgment which defines the issue to be arbitrated.

Affirmed.

ROBERT ABELOW, New York, N. Y. (Weil, Gotshal & Manges, New York, N. Y. and Carl A. Schwarz, Jr., New York, N. Y., of counsel), *for Defendant-Appellee-Appellant.*

SAMUEL J. COHEN, New York, N. Y. (Cohen and Weiss, New York, N. Y. and Stanley M. Berman, New York, N. Y., of counsel), *for Plaintiff-Appellant-Appellee.*

MOORE, *Circuit Judge*:

This is an appeal by defendant Borden, Inc. (Borden) from an order of the District Court directing the parties to proceed to arbitration. Plaintiff Ice Cream Drivers and Employees Union Local 757 ("the Union") cross appeals from the portion of the order which defined the issue to be arbitrated.

Borden's appeal is based primarily upon its contentions that (1) there were issues of fact not to be resolved upon a motion for summary judgment and (2) that the Union's violation of a no-strike clause in its labor agreement precluded it from arbitration so long as the strike continued. The Union's appeal advances the claim that the District Court defined the issues to be arbitrated more broadly than the Union had requested. Resolution of these questions calls for a close analysis of the undisputed material facts.

The action was brought by the Union to compel arbitration between the Union and Borden (61 Stat. 156, 29 U.S.C. §185(a)). Borden asserted a counterclaim to the effect that the Union had lost or "waived" its rights to

arbitration because it had breached the no strike clause of the Borden-Union labor agreement (the Agreement). The Agreement covered Borden's employees engaged in the production and distribution of ice cream in the "757 Area" (New York City, Nassau and Suffolk Counties).

The Union-Borden dispute arose out of a decision by Borden to close its Harlem ice cream manufacturing plant and to discontinue ice cream distribution in the New York metropolitan area. Notice thereof was given by Borden to the Union on August 25, 1969. The Agreement in substance provided that "for the term of this Agreement" Borden would not "remove its manufacturing operations from the area of Local 757" and would "continue to manufacture" within this area—Section 2(e). Section 2(d) related in part to obtaining products from outside sources including other divisions of Borden.[1]

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1 Sections 2(d) and 2(e) of the Agreement provide:

"(d) The Company agrees not to contract out work customarily performed by its employees. However, nothing herein contained shall prevent the Company from continuing to have work performed outside of the Company which prior to April 30, 1962 it customarily has had performed outside the Company. Supervisory employees shall not perform the duties of employees covered by this agreement.

"In order to protect the job opportunities and labor standards of all employees in the industry-wide collective bargaining unit and at the same time provide for greater flexibility of the companies covered by this Agreement, the Company will not purchase or obtain products from any source including any other division or plant of the Company except from an employer in the Metropolitan Area as defined in this Agreement providing its employees with wages, hours and benefits and all other terms and conditions of employment equal to or better than the requirements of this Agreement. It is further agreed that the Company will not purchase or obtain

Section 8 of the Agreement contained a broad arbitration clause for the arbitration of "Any and all disputes and controversies arising under * * * this Agreement, * * *", which was to be "the exclusive remedy for the enforcement of this Agreement * * *." Section 5(a) of the Agreement also provided in an equally broad no strike clause

> products from any source whatever including any other division or plant of the Company of any permanent production employee who is actively employed on May 1, 1968 or thereafter is on lay off from the production department and has been on lay off for a period of one (1) year or less at the time of the purchase of the product
>
> * * * * *
>
> "(c) The Company agrees for the term of this Agreement not to remove its manufacturing operations from the area of Local 757 and to continue to manufacture within the area of Local 757 and the Company including any affiliates or subsidiaries, agrees that it shall not establish or operate a plant for production of ice cream or frozen dessert products outside of the Local 757 area for sale or distribution of such products in the Metropolitan Area, however nothing herein shall restrict a company which formerly manufactured under contract with Local 757 or 680 from resuming such manufacturing under contract with said Local for distribution in its area.
>
> "The area of Local 757 shall be New York City and Nassau and Suffolk Counties in the State of New York."

2 Section 8 of the Agreement provides:

> "Any and all disputes and controversies arising under or in connection with the terms or provisions of this Agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein expressly provided but germane to the subject matter of this Agreement which the representative of the Union and the Company have been unable to adjust, shall be submitted to arbitration at the request of either party, to an Arbitrator selected from a list of Arbitrators to be furnished by the New York State Board of Mediation in each case. If no Arbitrator on such list is mutually acceptable to the parties, the Arbitrator shall be designated by the New York State Board of Mediation. The decision of the Arbitrator so selected or designated shall be final and binding upon the parties. The fees and expenses of the Arbitrator in such cases shall be borne equally by the parties. In order to expedite arbitration proceedings the New York State Board of Mediation shall submit a list of Arbitrators to the parties within 48 hours after request by either party and both parties shall be required to make their selection within 48 hours after receipt [sic] of such list. If either party shall fail to make a selection within such time

that "no strikes, lockouts, walkouts or slowdowns shall be ordered, sanctioned or enforced by either party hereto against the other during the life of this Agreement."

Subsequent to August 25, 1969 negotiations between Borden and the Union ensued but were unsuccessful in reaching an acceptable solution. A telegram on September 2d from the Union to Borden advised Borden that any closing would be regarded as a violation of the Agreement and that the Union would seek "REDRESS BY COURT PROCEEDINGS, BY ARBITRATION PROCEEDINGS . . . ." On October 1st Borden notified the Union by telegram that "IT IS NECESSARY THAT THIS ISSUE BE FINALLY RESOLVED PRIOR TO OUR PLANT CLOSING ON OCTOBER 3d.", and stated its position that "THE DISPUTE HINGES ON A SINGLE ISSUE 'THE COMPANY'S RIGHT TO GO OUT OF BUSINESS'." The Union replied the same day that it was "PREPARED IMMEDIATELY TO DISCUSS WITH YOU ALL THE ISSUES WHICH MAY BE APPROPRIATE FOR ARBITRATION . . ." and suggested a conference arranged by the respective attorneys. Discussions on October 1st, 2d and 3d being to no avail, Borden by telegram offered to meet on October 6th "FOR THE PURPOSE OF DEFINING THE ISSUES AND DESIGNATING AN ARBITRATOR." Borden closed its Harlem plant on October 3d. That same day the Union began picketing. On October 6th the Union went on strike (the Union alleges a lockout) in the 757 and north New Jersey areas, which strike and

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the Board shall be authorized to designate an Arbitrator from such list immediately.

"The arbitration procedures herein contained shall be the exclusive remedy for the enforcement of this Agreement and for adjudication of any grievances arising hereunder, and such arbitration procedures may be instituted only by the Union or the Employer."

picketing were in effect at least up to the time of the District Court's opinion.

As of October 13th, the Union's attorney wrote Borden, requesting arbitration of the issue:

> "Has the Company violated Section 2(e) of the collective bargaining agreement by closing its Harlem plant; is so, what remedy or remedies is the Union entitled to?"

By letter of October 17th, Borden offered to exchange lists of arbitrators and "to define an issue for arbitration." This offer was conditioned upon the discontinuance of an asserted "illegal work stoppage" and picketing.

As of October 24th the Union requested from the New York State Board of Mediation arbitration of the issue:

> "Has the Company violated Sections 2(d) and 2(e) of the collective bargaining agreement; if so, what remedy or remedies is the Union entitled to?"

Borden (by letter, November 4th) advised the Mediation Board that until the illegal work stoppage and picketing ceased, "no arbitration proceeding should be processed." Borden added that it did not "agree with the issues as stated by the union" but would "define the proper issue(s) at the appropriate time.", and listed its preferences as to arbitrators.

On November 13th the Union brought this action, demanding judgment "requiring defendant to arbitrate, pursuant to the contract, the above described dispute," this was the dispute unilaterally asserted by the Union in its letter of October 24th to the Mediation Board and granting such other and further relief as might be appropriate. Borden's answer, primarily its affirmative defense and

counterclaim, in substance asserted its claim that, by striking, the Union had waived or forfeited its right to arbitration and that this forfeiture continued as long as the Union engaged in the strike and picketing.

The issues were raised before the District Court by plaintiff's motion for summary judgment. The Court granted the Union's motion, dismissed Borden's counterclaim and sent to arbitration "the disputes between [Borden and the Union] arising out of Borden, Inc.'s closing of its manufacturing operations in the area, defined by the Collective Bargaining Agreement as the 757 Area."

On appeal Borden argues (1) that there were genuine issues of material facts, thus precluding the granting of summary judgment in the Union's favor and (2) that by going out on strike the Union waived its right to arbitration. On this second point the Union and the Court below rely heavily on *Local 721, United Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964) in support of the no waiver argument. Borden, in turn, cites *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (June 1, 1970) as indicating, by the overruling of *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), that the right to arbitration has been forfeited by the strike.

I.

Borden contends that before the rights of the parties under the Agreement can be ascertained, the court first must determine the nature of the work stoppage because "if there was a waiver the Court could not order arbitration" (Borden Brief, p. 16). This flat statement is predicated upon the assumption that, on the state of facts now presented to this court, a finding of fact that the Union violated on October 3, 1969 its no-strike obligations of the

Agreement would preclude any resort to the arbitrational process as defined in the Agreement.

The problem is not to be so simply resolved. The Congressional policy of encouraging arbitration as a means of settling labor disputes has been strongly supported by court decisions. See both the reasoning and the review of pertinent decisions in *Boys Markets, Inc.* v. *Retail Clerks Union, supra.* For this reason, a waiver of rights under an arbitration is not readily to be found. The decisions in *Drake Bakeries* v. *Local 50, American Bakery & Confection Workers International*, 370 U.S. 254 (1962) and *Local 721, United Packinghouse, Food and Allied Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964) expressly hold that arbitration rights are not necessarily forfeited by the breach of a no-strike clause.

In determining the effect of the alleged strike upon the right to arbitrate, the Court below did not have the benefit of *Boys Markets, supra.* That decision opened (or possibly reopened) the right of the employer to seek injunctive relief to protect its no-strike clause. But that is not this case. Borden quite understandably believed that it was living in the era of *Sinclair* and acted accordingly. As conceded, injunctive relief now would be of no avail.

The Court below held that *Needham* is "controlling here." Unless there is to be found any statement in *Boys Markets* to the contrary, the law as expounded in *Drake Bakeries* and in *Needham* is that breach of a no-strike clause in a labor agreement does not *ipso facto* relieve an employer of his obligation to arbitrate the disputes engendered by the acts causative of the strike. Although the Supreme Court specifically overruled *Sinclair Refining Co.* v. *Atkinson, supra,* which had held "that the anti-injunction provisions of the Norris-LaGuardia Act[1] [footnote

omitted] preclude a federal district court from enjoining a strike in breach of a no strike obligation under a collective bargaining agreement, even though that agreement contains provisions, enforceable under §301(a) of the Labor Management Relations Act,' [footnote omitted] for binding arbitration of the grievance dispute concerning which the strike was called.", *Boys Markets, supra*, at 237-238, neither majority nor minority opinion made any reference to *Drake Bakeries* or to *Needham*. Its decision was "a narrow one" and affirmed an order of the district court granting injunctive relief hitherto seemingly barred by *Sinclair*. Thus we cannot read *Boys Markets* as overruling *Drake Bakeries* or *Needham*—in fact, *Boys Markets* reaffirms the benefits intended to be conferred on the employer-employee relationship by resort to the arbitrational process.

This issue of law here is clearly revealed by the motion papers. Further investigation into the underlying facts is unnecessary to decide this question. The merits of Borden's action in closing the Harlem plant, the Union's action in engaging in picketing and in a strike, the Agreement obligations of Borden and the Union under the circumstances and the kindred issues related thereto are questions for the arbitrator.

II.

As to the issues to be arbitrated, the District Court ordered the parties to proceed to arbitration of "the disputes between Borden, Inc. and Ice Cream Drivers and Employees Union, Local 757, arising out of Borden, Inc.'s closing of its manufacturing operations in the area."

The Union urges on its appeal that the Court should have restricted the arbitrator to the Union's proposed question: "Has the Company violated Sections 2(d) and 2(e) of the collective bargaining agreement; if so, what remedy

or remedies is the Union entitled to?" An answer "yes" or "no" to such a unilateral question would not have settled the parties' disputes. Arbitration is not a one-way street. The Union virtually concedes the nature of the dispute in saying: "The dispute between the parties involves the employment, pension and other rights and benefits of hundreds of employees." (App., p. 49a) in fact, it objected to "the company's attempts to circumscribe and limit the arbitration procedure."

The District Court was faced with a situation in which the parties had not agreed upon a specific question. The cause of the dispute is clear—the closing of the Harlem plant. The Union claims that Borden's acts violated the Agreement and brought damage to its members. Borden claims that the strike was a violation of the Agreement and resulted in substantial damage to the company. The Court wisely concluded that there should be no narrowly restricted or piece-meal issues presented for arbitration but rather that "the disputes" arising out of the plant closing should be heard and resolved. This judgment is in conformity with the Supreme Court's philosophy so clearly expressed in *Boys Market*.

Judgment affirmed.

KAUFMAN, *Circuit Judge* (dissenting in part and concurring in part):

I endorse my brothers' view that *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), was designed to promote arbitral settlement of labor disputes. I therefore join in their refusal in Part I of their opinion to misuse *Boys Markets* by forbidding arbitration of this clearly arbitrable dispute. However, in Part II *Boys Markets* is made to revolve 180 degrees, a maneuver ad-

mirable for its suppleness if not for its consistency. I would not invite dalliance in future arbitrations by rewarding Borden's litigiousness when it should have been arbitrating.

No more than my colleagues do I favor "piece-meal" dispositions. However, in broadening the submission to encompass disputes other than the one framed by the Union, the majority, I fear, has lost from view the severe limitations that the Supreme Court has imposed on our discretion in pre-arbitral litigation. Our power "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of America* v. *American Manuf. Co.*, 363 U.S. 564, 568 (1960). Although Judge Cooper's submission seems innocuous enough—even "wise" as the majority characterizes it—I am apprehensive that in overstepping the bounds marked out by such cases as *American*, today's decision invites difficulties that the Supreme Court has often and assiduously sought to avoid.

A common understanding of the parties as to the issues for settlement is hardly to be expected between adversaries in any judicial or quasi-judicial context. Borden could have availed itself of the opportunity to submit its own statement of the dispute, either before or after the Union's submission. It can do so now. If two divergent statements were to be submitted together, it is reasonable to believe that an experienced arbitrator would not be at a loss to hear the respective positions presented and to merge them as justice, common sense, and his own training might suggest.

Nor can I imagine that the union's statement of the issue would paralyze the arbitrator from taking account of all the facts relevant to a just decision. If today's reformulation requires him to decide issues other than those

pertinent to the dispute identified by Borden's submission, then the majority is compelling arbitration that no party has properly requested. And we have been instructed that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

By ignoring this mandate, the majority not only short-circuits the contractual arbitration machinery, but condones the court's interjection into the merits of the controversy between Borden and the union. The "cause" of this controversy may be as "clear" as the majority finds it or it may be muddy, but we have been warned that such "procedural" questions as the proper scope of the pleadings "which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557 (1964). He is better qualified than we by expertise and attitude to understand the ramifications of any redefinition of the issues in the context of "the general body of the law of the enterprise." H. Wellington, Labor and the Legal Process 105 (1968).

More disturbing to me about today's ruling are "the opportunities for deliberate delay" inherent in offering a haven in this court for disputants casting about for ways to delay or avoid their obligation defined by contract to go to arbitration. Both parties voluntarily chose not to lay in the path of quick disposition such obstacles as a requirement that they be in perfect agreement on the statement of issues to be arbitrated. "In order to expedite arbitration" the collective bargaining contract before us allows only 96 hours for the selection of an arbitrator. In short, the experienced counsel of both parties sought to make the contract's arbitration provision expeditious and meaningful and to avoid the delaying procedures encountered in a

case such as *Socony Vacuum Tanker Men's Ass'n* v. *Socony Mobil Oil Co.*, 369 F.2d 480 (1966).* We should not permit either party to frustrate the other's desire to put this admirably expeditious procedure to its intended use simply by insisting on a counter-statement of the other's submission and requiring that the court frame the issue. When the sole question presented to the judge is the contractual interpretation of the arbitration clause and not what should be arbitrated, the courts are better advised to stay out of the thicket of framing issues and to leave that to the experienced arbitrator.

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* By contrast, in *Socony* I joined in rejecting the company's contention that it could effectively emasculate the contractual arbitration procedure simply by refusing to agree to a common definition of the dispute. In that case, where the collective bargaining contract explicitly required that the parties agree on a submission, the only reasonable solution was for this court to undertake to define the issues.

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C. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 197[illegible]

No. 1095

BORDEN, INC.,

Petitioner,

vs.

ICE CREAM DRIVERS AND EMPLOYEES UNION LOCAL 757, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SAMUEL J. COHEN
Attorney for Respondent
605 Third Avenue
New York, N. Y. 10016

Of Counsel:
SAMUEL J. COHEN
STANLEY M. BERMAN
COHEN, WEISS AND SIMON

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1095

BORDEN, INC.,

Petitioner,

VS.

ICE CREAM DRIVERS AND EMPLOYEES UNION LOCAL 757, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated October 26, 1970, is reported at — F.2d — and at 75 LRRM 2481 and 64 CCH Lab. Cas. ¶ 11,238. It is reproduced in full at pages 24-36 of the appendices annexed to the instant petition. The opinion of the United States District Court for the Southern District of New York, dated April 21, 1970, is reported at 312 F. Supp. 549 and at 74 LRRM 3020 and 62 CCH Lab. Cas.

¶ 10,822. It is reproduced in full at pages 13-21 of the appendices annexed to the instant petition and at pages 58a-65a of the appendix before the Court of Appeals.

Statute Involved

The statute involved is Section 301(a) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a), as amended, 61 Stat. 156, which states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Questions Presented

1. In an action by a union to compel arbitration, in which the union moves for summary judgment, and where

(a) there is an all-inclusive arbitration clause, and

(b) the issue sought to be arbitrated is admittedly arbitrable,

is it a valid defense for the employer to assert that the union has forfeited its right to arbitrate because it has picketed or taken strike action?

2. Is there any material issue of fact in this case which would preclude the granting of summary judgment to the union?

Statement of the Case*

A. The Dispute in Issue.

Petitioner (hereinafter "Borden") and Respondent (hereinafter the "Union") are parties to a collective bargaining agreement effective May 1, 1968 to April 30, 1971 (R.4a-5a, R.11a, R.23a) (hereinafter the "Agreement"). Section 8 of the Agreement contains the following all-inclusive arbitration clause:

> "Any and all disputes and controversies arising under or in connection with the terms or provisions of this Agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein expressly provided but germane to the subject matter of this Agreement which the representative of the Union and the Company have been unable to adjust, shall be submitted to arbitration, at the request of either party, to an Arbitrator selected from a list of Arbitrators to be furnished by the New York State Board of Mediation in each case." (R.7a-R.8a).

The Union's attorney, pursuant to the above-quoted provision, wrote the Chairman of the New York State Board of Mediation on October 24, 1969, as follows:

> "I am writing to you on behalf of Ice Cream Drivers Local Union 757 of 265 West 14th Street, New York City. The Union requests arbitration with the above employer [Borden] of the following issue:

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* Respondent, being dissatisfied with Petitioner's statement of the case, makes this statement pursuant to Rule 40.3. Pursuant to Rules 12 and 40.2 references to pages of the Record are preceded by the letter "R" and are made to pages of the printed appendix before the Court of Appeals. Petitioner's statement of the case contains no references to the Record.

> 'Has the Company violated Section 2(d) and 2(e) of the collective bargaining agreement; if so what remedy or remedies is the Union entitled to?' " (R.42a, R.57a)

The dispute referred to arose out of the closing by Borden on October 3, 1969 of its only ice-cream manufacturing plant (the "Harlem plant") in the geographical area defined in the Agreement as the "area of Local 757."* (R.8a, R.11a). The Union contended that Borden's termination of manufacturing in the area of Local 757 violated Section 2(e) of the Agreement and that Borden's distribution in the "Metropolitan Area," as defined in the Agreement,** of products manufactured outside the Metropolitan Area, violated Section 2(d) of the Agreement (R.7a-R.8a). Sections 2(d) and 2(e) provide in relevant parts as follows:

> "(d) * * * In order to protect the job opportunities and labor standards of all employees in the industry-wide collective bargaining unit and at the same time provide for greater flexibility of the companies covered by this Agreement, the Company will not purchase or obtain products from any source including any other division or plant of the Company except from an employer in the Metropolitan Area as defined in this Agreement providing its employees with wages, hours and benefits and all other terms and conditions of employment equal to or better than the requirements of this Agreement." (R.5a-R.6a).
>
> "(e) The Company agrees for the term of this Agreement not to remove its manufacturing opera-

---

* The area of Local 757 is New York City and Nassau and Suffolk Counties in New York. (Agreement §2(e) (R.6a)).

** The Metropolitan Area includes the area of Local 757, two additional counties in New York and thirteen counties in New Jersey. (Agreement §19 (R.6a-R.7a)).

> tions from the area of Local 757 and to continue to manufacture within the area of Local 757, . . ." (R.6a).

The complaint sought to compel arbitration of the above-described dispute. (R.8a-R.9a).

Borden conceded that:

> "As alleged in the complaint, plaintiff [the Union] and defendant [Borden] have a dispute over the interpretation and enforcement of the contract." (R. 11a).

The District Court found that:

> "The parties concede that the underlying dispute over whether Borden violated sections 2(d) and (e) is encompassed within their agreement to arbitrate and thus arbitrable." (R.61a).

The Mediation Board offered its services pursuant to the Agreement, and an arbitrator was selected to hear the dispute. (R.60a). Borden, however, refused to arbitrate, contending that the Union was on strike. (R.43a-R.44a).

The District Court granted the Union's motion for summary judgment compelling arbitration upon the basis of these uncontroverted facts, and the Court of Appeals affirmed that decision.

It is the Union's position that the only issue relevant to this action is the arbitrability under the Agreement of the above-described dispute, and that such issue must be determined solely upon the above facts. The Court of Appeals agreed with this position and stated:

> "This issue of law here is clearly revealed by the motion papers. Further investigation into the underlying facts is unnecessary to decide this question. The

> merits of Borden's action in closing the Harlem plant, the Union's action in engaging in picketing and in a strike, the Agreement obligations of Borden and the Union under the circumstances and the kindred issues related thereto are questions for the arbitrator." (Petition, p. 32).

The statement of the case in Borden's petition contains many allegations which under the Court of Appeals' opinion are irrelevant to this action. In addition inaccurate statements and issues in dispute are stated as facts without citation to the Record and without support in the Record. Because of this, it is necessary to refer, without in any way conceding the relevancy of Borden's allegations, to the following facts as set forth in the Record.

B. Background to the Dispute.

The Union represents ice cream manufacturing and delivery employees. (R.4a). The dispute in issue was precipitated by Borden on August 25, 1969, when it announced to the Union its unilateral decision to close the Harlem plant and to dismiss hundred of employees with many years of seniority. (R.25a, R.47a). The Union immediately notified Borden of its position that such action would violate Borden's specific contractual commitment "... to continue to manufacture within the area of Local 757" for the duration of the Agreement. (R.47a-R.48a, R 54a).

Meetings between Borden and Union representatives during the month of September, 1969 failed to resolve the dispute. (R.26a, R.48a).

On October 1, 1969, Borden sent a telegram to the Union stating that the "single issue" involved was "the company's right to go out of business." Borden demanded arbitration

of "this question", and offered to "cooperate in every way possible to expedite the arbitration to resolve this issue within the time limits." The "time limits" demanded by Borden in this October 1, 1969 telegram was that the issue be finally resolved prior to the ". . . plant closing on October 3, 1969." (R.37a).

This "issue" was irrelevant to the real issue in dispute. Borden was not threatening to go out of business, and Borden has not gone out of business. It is not disputed that Borden is one of the country's largest corporations and remains actively engaged in various lines of business including the sale and manufacture of ice cream. (R.49a). It is the Union's claim that Borden continues to sell and distribute within the Metropolitan Area ice cream manufactured elsewhere. (R.7a)

The Union repeatedly has pointed out that the real issue in this dispute concerns Borden's contractual commitment ". . . to continue to manufacture within the area of Local 757. . . ." (R.49a). An additional but related issue is the sale and distribution by Borden, subsequent to the closing of the Harlem plant, of the Metropolitan Area of ice cream products manufactured outside the Metropolitan Area in violation of Section 2(d) of the Agreement. (R.49a).

The Union responded on the same day to Borden's October 1, 1969, "offer" to arbitrate the "single issue", by offering ". . . immediately to discuss with you all issues which may be appropriate for arbitration and to establish sensible procedures for their hearing and determination." (R.55a). The parties met to discuss arbitration on October 1, 2, and 3. The Union requested that the plant be kept open and that the dispute be arbitrated promptly without

conditions. (R.26a-R.27a, R.50a-R.52a). Borden insisted that time limitations be placed upon the arbitrator and the parties and that the issue be defined in the distorted manner above described. (R.26a, R.49a).

Borden's final answer, given on October 3, with reference to the Union's proposal to arbitrate while the plant was kept open without the imposition of artificial time limits was "no dice". (R.52a).

Borden asserts as fact but without citation to the Record that,

> " . . . the Union struck Borden at 3:00 P.M. on October 3, 1969. . . . On October 6, 1969, the Monday following the closing, the Union struck *all* Borden ice cream production and distribution facilities throughout the 757 area. . . .
>
> • • •
>
> The strike continued while the case was being argued in the Second Circuit although the picketing ceased prior to argument." (Petition, pages 6-7) (emphasis in original).

The facts are (1) that the Union has at all times denied Borden's allegation of a strike and has contended that its members were locked out; (2) that this factual dispute has not been resolved; and (3) that the Record is devoid of any allegation of a strike or picketing while the present action was before the Court of Appeals.

Borden alleged a strike in its counterclaim (R.11a). This allegation was denied in the Union's reply (R.13a.) and in the Union's papers in support of its motion for summary judgment. (R.17a) Borden conceded that the Union contended from the first days of the dispute that Borden's action was an

illegal lockout. (R.25a-R.29a). The District Court held that whether or not there was a strike was a question for the arbitrator and did not make any finding on that issue. (R.61a-R.62a.) The Court of Appeals recognized that "the Union alleges a lockout . . ." (Petition, p. 28), referred to "the alleged strike" (Petition, p. 31), and left further inquiry into the matter to the arbitrator. (Petition, p. 32). There is no factual basis for Borden's conclusory statement that the Union has been and is on strike.

Borden also asserts as fact, again without Record citations, that:

> "*At Borden's request*, almost continual negotiations took place in regard to the proposed closing and the problems incidental thereto." (Petition, page 6) (emphasis added).

The affidavit of Stanley J. Brockman submitted by Borden to the District Court states, however, that:

> "The Union responded on the same day [October 1 1969] by telegram, the full text of which is attached and marked Exhibit D, in which it proposed that the Company and the Union meet to discuss issues which may be appropriate for arbitration and establish procedures for their hearing and determination.
>
> Representatives of the Union and Company did meet on the evening of October 1, October 2 and October 3, 1969." (R.26a)

Borden also asserts as fact, again without citation to the Record, that:

> "On October 1, 1969 Borden proposed an immediate arbitration of the disputed issues and offered to keep the facility open and operating during the

> pendency of the arbitration and abide by the decision of the arbitrator." (Petition, page 6).

The Record shows, however, that the Union and not Borden sought to maintain the status quo pending arbitration. Mr. Brockman's affidavit states:

> "During these negotiations the Union took the position that it would be willing to arbitrate the issue of whether the Company had the right to go out of business so long as the Company maintained the status quo by not closing the Fifth Avenue Plant." (R.37a).*

Borden stated only that it "would consider" the Union's request to preserve the status quo. (R.39a)

It is the Union's position, as stated above, that the District Court and the Court of Appeals properly declined to resolve issues which the parties reserved for the arbitrator and that Borden's statement of the case improperly relies upon irrelevant allegations. In any event, it is clear from the Record that Borden's statements are nothing more that conclusory allegations which have no basis in fact.

Summary of Argument

It is the Union's position that there is no basis for granting certiorari herein and that the District Court properly granted summary judgment because there are no issues of material fact.

The argument which follows is divided into two parts. The Union contends in the first part of the argument that certiorari should be denied because the decisions of the courts below foster peaceful settlement of labor disputes

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* The Union did not agree to change the issue to the form proposed by Borden (R.50a), but that question is not relevant since Borden has refused to arbitrate any issue.

through arbitration pursuant to principles established in decisions of this Court from *Textile Workers of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957) and the *Steelworkers Trilogy*, 363 U.S. 564, 363 U.S. 574, 363 U.S. 593 (1960) through *Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235 (1970).

The Union contends in the second part of the argument that under applicable decisions of this Court summary judgment compelling arbitration was appropriate because the papers before the District Court established conclusively that the dispute sought to be arbitrated was arbitrable under the Agreement between the parties.

ARGUMENT

POINT I

The decisions of the District Court and the Court of Appeals conform to applicable law and decisions of this Court, and there are no reasons why certiorari should be granted.

A. Applicable Decisions.

The Court of Appeals found the decision of the District Court compelling Borden to arbitrate to be in conformity to this Court's decisions in *Local 721, United Packinghouse, Food and Allied Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964) and *Drake Bakeries* v. *Local 50, American Bakery & Confectionary Workers International*, 370 U.S. 254 (1962). (Petition, pages 30-32). As shown by the District Court (R.62a-R.64a), there are no material factual distinctions between the present case and *Needham*.

Applicable decisions of other Courts of Appeals are in accord. See *G. F. Wright Steel & Wire Co.* v. *United*

Steelworkers, 346 F.2d 928 (1st Cir. 1965); *Trailways of New England Inc.* v. *Amalgamated Assoc. etc.*, 343 F.2d 815 (1st Cir. 1965); *Minnesota Joint Board* v. *United Garment Manufacturing Co.*, 338 F.2d 195 (8th Cir. 1964). Borden has cited no conflicting decision of any Court of Appeals, and there are none.

Borden does not dispute that the decision of the Court of Appeals is fully in accord with the applicable principles of law and decisions. Accordingly, it asks this Court to "reconsider" its holdings in *Needham* and *Drake Bakeries* ". . . in light of this Court's recent holding in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970)." (Petition, page 9).

The Court of Appeals found *Boys Markets* to be consistent with *Needham* and *Drake Bakeries* and rejected Borden's contention. (Petition, page 32). Borden argues, however, that:

> "It is apparent that the decisions of both the District Court and the Second Circuit are grounded in the philosophy that a union can strike in violation of a no-strike clause over an arbitrable issue and simultaneously invoke the power of the courts in compelling arbitration. Such a judicial axiom renders the *quid pro quo* equation stated in *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957) meaningless and has an effect contrary to the recent decision of this Court in *Boys Markets*, which restored the impact of the *quid pro quo* enunciated in *Lincoln Mills*." (Petition, page 9).

Notwithstanding Borden's conclusion as to the "philosophy" of the Courts below, the purpose and effect of their decisions, as stated by the Court of Appeals, was, consistent

with *Boys Markets*, *Needham* and *Drake Bakeries*, to reaffirm ". . . the benefits intended to be conferred on the employer-employee relationship by resort to the arbitrational process." (Petition, page 32).

B. The Boys Markets Decision.

This Court's decision in *Boys Markets* was,

> "'a narrow one' and affirmed an order of the District Court granting injunctive relief hitherto seemingly barred by *Sinclair*." (Petition, page 32)

The decision permits an employer (1) who seeks to arbitrate a dispute, and (2) who can show an equitable need therefor, to obtain an injunction against a strike in breach of contract over such dispute. This Court stated:

> "Our holding in the present case is a narrow one.
>
> • • •
>
> 'Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity . . .'
>
> In the present case there is no dispute that the grievance in question was subject to adjustment and arbitration under the collective bargaining agreement *and that the petitioner [employer] was ready to proceed with arbitration at the time an injunction against the strike was sought and obtained.*" 398 U.S. at pp. 253-254 (emphasis added).

Boys Markets did not purport to remove any disputes from arbitration. Per contra, it preserved the jurisdiction of the arbitrator where the party seeking the aid of the court was willing to arbitrate under the contract. *Drake Bakeries* similarly preserved the jurisdiction of the arbitrator by requiring an employer who agreed to arbitrate the merits of alleged

strikes in breach of contract so to arbitrate. *Needham* accomplished the same purpose by requiring an employer, who wanted to use a union's illegal strike to avoid arbitration, to arbitrate the merits of both the underlying dispute and the strike.

Under *Boys Markets* the jurisdiction of the arbitrator under *Needham* and *Drake Bakeries* remains the same, and the parties are provided with equitable relief ancillary to arbitration, not in derogation of arbitration. Borden now asks the Court to apply *Boys Markets* to defeat the jurisdiction of the arbitrator by approving its refusal to arbitrate a dispute concededly arbitrable under the Agreement.

Unlike the petitioner in *Boys Markets* Borden is the recalcitrant party to the arbitration agreement. This action does not involve an employer's right under *Boys Markets* to enjoin an illegal strike as an aid to arbitration or a union's right to enjoin an illegal lockout as an aid to arbitration. Neither party has sought such relief.* Borden seeks only to avoid arbitration. What is involved is the Union's right to compel arbitration. That right was determined in *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957), and has been reaffirmed in subsequent decisions of this Court, including *Boys Markets*.

> "As we have previously indicated, a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration. See *Textile Workers Union* v. *Lincoln Mills*, *supra*, at 455." 398 U.S. at pp. 247-248.

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* As has been shown (page 10, *supra*), it was the Union here which sought to preserve the status quo pending arbitration.

It is illogical for Borden to argue, as it does here, that because a strike can be enjoined, the Union is precluded from arbitration. If there is a strike in breach of contract now going on, as Borden claims without proof in the Record, Borden can today, under *Boys Markets*, apply for injunctive relief. It cannot, however, avoid arbitration. Indeed this Court established in *Boys Markets* that as a condition precedent to such relief the employer must agree to arbitrate.

The decision of the Court of Appeals is in conformity to decisions of other courts of appeals on the same matter and to applicable decisions of this Court; it involves a question of arbitrability under federal law already settled by this Court; and it does not depart from the accepted and usual course of judicial proceedings. There is no basis for review on writ of certiorari.

POINT II

The District Court properly granted summary judgment compelling arbitration because it was uncontroverted that the dispute sought to be arbitrated was arbitrable.

This Court has described the judicial function in actions to compel arbitration as follows:

> "It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of America* v. *American Manufacturing Co.* 363 U.S. 564, 568 (1960).

Borden conceded that:

> "As alleged in the complaint, plaintiff and defendant have a dispute over the interpretation and enforcement of the contract." (R.11a)

The District Court found:

> "The parties concede that the underlying dispute over whether Borden violated sections 2(d) and (e) is encompassed within their agreement to arbitrate and thus arbitrable." (R.61a)

The above facts being uncontroverted upon the motion papers, summary judgment compelling arbitration was appropriate. The same would have been true even if Borden had not conceded arbitrability. The Agreement's arbitration clause is broad, and the dispute in issue directly involves specific sections of the Agreement. See *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

Borden argues that summary judgment was not appropriate:

> "Borden further contends that the existence of genuine issues of material facts presented by the pleadings and the affidavits submitted to the District Court precluded Summary Judgment and required a hearing.
>
> Borden contended that the Union was on strike, the Union contended it was locked out. * * *
>
> Borden also contends three other issues of fact involving the Union's tactics in attempting to utilize its strike power and at the same time compel arbitration bar Summary Judgment." (Petition, page 11).

The "three other issues of fact" are not identified.

Taken at best, Borden's contention is that the Union's alleged illegal strike and initial refusal to arbitrate released Borden from its obligation to arbitrate. (Petition, page 10). The contention is without merit (1) upon the present

Record, and (2) even upon the assumption that Borden could prove at trial an illegal strike and initial refusal by the Union to arbitrate.

1. As shown in the Statement of the Case, *supra*, the Union has at all times insisted upon arbitration, and there is a dispute as to whether the Union struck or was locked out or whether there was both a strike and a lockout. The existence of such dispute does not preclude arbitration, but requires instead that the dispute itself be resolved by the arbitrator. *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionary Workers International, supra.*

2. Even if Borden could prove at trial that the Union struck in violation of the Agreement and refused an initial offer by Borden to arbitrate, Borden would not be relieved of its duty to arbitrate. As shown by the District Court (R.62a-R.65a), the facts would then be the same as in *Local 721, United Packinghouse Workers* v. *Needham Packing Co., supra*, in which this Court ordered the employer to arbitrate. Borden's argument that this case involves "... a fundamental and long-lasting change in the relationship of the parties prior to the Union's demand for arbitration" sufficient to distinguish *Needham* (Petition, page 10) is unfounded. The only "change" present in the instant case and absent in *Needham* is Borden's closing of the plant, *i.e.*, the act which gave rise to the instant dispute. Borden should not be permitted to defeat arbitration because of its own breach of the Agreement .

Under the controlling decisions of this Court and upon full consideration of "the policy of our national labor laws" (*Textile Workers of America* v. *Lincoln Mills of Alabama, supra* at 353 U.S. 456) there are no material issues of fact which could preclude summary judgment.

CONCLUSION

For the foregoing reasons, the instant petition should be denied.

Respectfully submitted,

SAMUEL J. COHEN
Attorney for Respondent

Of Counsel:
SAMUEL J. COHEN
STANLEY M. BERMAN
COHEN, WEISS AND SIMON